UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PATENT CONSTRUCTION SYSTEMS,
A HARSCO COMPANY

and Case 4-CA-25735

RICHARD ELDRIDGE, an Individual

William Slack,Jr. and John F. King, Esqs.
of Philadelphia, Pennsylvania, for
the General Counsel.

Vince Candiello, Esq., of Harrisburg,
Pennsylvania, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Philadelphia, Pennsylvania, on November 19, 1997, upon the General Counsel's complaint which alleged that the Respondent refused to rehire its employee Richard Eldridge because of his union activities in violation if Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* The Respondent denied that it committed any violations of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

The Respondent is a Delaware corporation with a branch facility at Conshohocken, Pennsylvania, engaged in the business of selling and renting construction related equipment. In the conduct of this business, the Respondent annually derives gross revenues in excess of $500,000 and annually receives goods purchased directly from outside the Commonwealth of Pennsylvania valued in excess of $50,000. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

General Teamsters, Chauffeurs, Helpers and Yardmen Union, Local No. 470 a/w International Brotherhood of Teamsters, AFL-CIO (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts.

The Respondent is a subsidiary of Harsco corporation, as is (or was) Patent Scaffolding Company. The later was a party to a collective bargaining agreement with the Union which included a provision that in the event the company was to cease doing business and layoff its employees, for five years those employees would be entitled to recall in the event the company recommenced operations.

In May 1993, Patent Scaffolding ceased operations within the geographical jurisdiction of the Union and laidoff its employees, the last of whom was the Charging Party, Richard Eldridge.

In August 1996, Joseph Sullivan, the Union's President, discovered that the Respondent had opened for business and by letter of August 14, directed to "Martin Kindred, Manager Patent Construction Company" noted that "furloughed workers from the Philadelphia facility still had recall rights. . . ."

Sullivan testified that he talked with Kindred by phone in September to set up a meeting to discuss a contract and that only one of the previously employed yard men "had expressed an interest to come back and that was Mr. Eldridge." Sullivan testified that Kindred said, "Let's talk about the contract first." They then met on October 2, and again Sullivan said that "Mr. Eldridge expressed an interest to return to work," and again, Kindred said, "Let's talk about the contract." Sullivan further testified that Kindred said Eldridge would have to pass a physical examination and drug test, to which Sullivan stated he had no problem. Indeed, Sullivan tesified that he did "send him to the company." There is no evidence that Eldridge went.

By letter of October 14, Kindred confirmed the meeting "to discuss Patent's return to the Philadelphia area." And, "We feel that it will be essential to Patent's long-term interests that, if our employees select you as their bargain agent, Patent has a separate agreement . . ." He then outlined several factors the Respondent would seek in any potential agreement.

Sullivan took this letter to mean he had to organize the employees, and he did so. He made a demand for recognition by letter, and he filed a petition with the Board, both on January 24, 1997. On February 4, the Respondent granted recognition and the parties subsequently entered into negotiations.

During this period the Respondent advertised for warehouse employees in the local newspaper, and in fact and in fact hired three yard employees -- two in August and one in December. Eldridge neither applied for a job nor was he hired, and in March 1997 he died.

B. Analysis and Concluding Findings.

The General Counsel argues that Kindred's statements to Sullivan must be construed to mean that Respondent conditioned Eldridge's employment on a successful resolution of a contract and therefore, in effect, the Respondent refused to consider him for employment because of his association with the Union. Alternatively, the General Counsel contends that the Respondent made the hiring of Eldridge a bargaining chip -- holding up his rehire in order to secure more favorable terms from the Union.

The Respondent argues that Eldridge cannot be found to have been denied a job since he never made an application. Further, the Respondent argues that critical to a violation of Section 8(a)(3) is a finding of anti-union motivation and here there is none.

According to the testimony of Sullivan, the most he said about Eldridge was that Eldridge "expressed an interest" in returning to work pursuant to the provisions of the contract the Union had with Patent Scaffolding. Sullivan did not testify that he applied for a job on behalf of Eldridge, only that Eldridge was entitled to a job and he was interested. All references to Eldridge by Sullivan were in the context of his alleged recall rights and not as an applicant for employment.

The testimony of Sullivan and Kindred, along with Kindred's letter of October 14 and the subsequent events are consistant with Kindred's position that the Respondent's operation was new and the previous contract between the Union and Patent Scaffolding was not applicable. Since the employee complement was new, the Union should organize them.

That Kindred told Sullivan they should resolve the contract before discussing whether Eldridge had recall rights does not necessarily mean he refused to hire Eldridge. Indeed, at a meeting between Sullivan and Kindred on October 2[1] Kindred said that Eldridge would have to go to the company in order to schedule a physical examination and drug test, and "I (Sullivan) sent him (Eldridge) down after the conversation I had with Mr. Kindred, I did in fact send him to the company." There is no evidence that in fact Eldridge complied.

I conclude that Eldridge was not hired because he did not take the necessary steps to become employed and not because of his association with the Union. Assuming that Sullivan's statements to Kindred amounted to an application, there is no evidence in the record from which to conclude that had Eldridge presented himself for a physical examination and drug screening he would not have been hired.

Finally, there is absolutely no evidence of animus toward the Union.[2] Indeed, the Respondent voluntarily recognized the Union and within a short period agreed to a contract. (According to Sullivan the ratification vote was one to one, and at the time of the hearing the parties had no contract.) There is no evidence from which to infer a motive to discriminate

[1] There is no dispute that Sullivan and Kindred met in Sullivan's office on or about October 2. In Sullivan's affidavit he refers to a meeting on September 2, which I believe was a mistake.

[2] I find *Fluor Daniel, Inc.,* 311 NLRB 498 (1993), relied on by the General Counsel inapposite. In that case there was substantial evidence of disparate treatment between the 54 applicants who wrote "voluntary union organizer" on their applications and the 195 who were hired. There was also evidence of conduct violative of Section 8(a)(1). Even so, the Board did dismiss one allegation where the alleged discriminatee filed an insufficient application.

against Eldridge because of his interest in or membership in the Union.[3] Nor is there any basis to conclude that the Respondent had anything to gain in negotiations by delaying the hiring of Eldridge.

Accordingly, I conclude that the General Counsel failed to prove by a preponderance of the credible evidence that the Respondent violated Section 8(a)(3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [4]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C.
January 22,1998

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James L. Rose
Administrative Law Judge

[3] I also find *Shortway Suburban Lines, Inc.,* 286 NLRB 323 (1987) inapposite. There the Board held that the company's failure to hire its predecessor's employees was "because of their union affiliation and the bargaining obligation which would be imposed. . . ." The Respondent never sought to avoid bargaining with the Union.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.